

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460



EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

June 27, 2019

Return Receipt Requested

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In Reply Refer to:

EPA Complaint No. 02NO-19-R6

James C. Kenney
Cabinet Secretary
New Mexico Environment Department
1190 St. Francis Dr., Suite N4050
Santa Fe, NM 87505

Re: Notification of Partial Acceptance of Administrative Complaint

Dear Secretary Kenney:

The U.S. Environmental Protection Agency (EPA), External Civil Rights Compliance Office (ECRCO), is accepting, in part, for investigation an administrative complaint filed against the New Mexico Environment Department (NMED), received by EPA on June 3, 2019. ECRCO received supplemental information to the initial complaint on June 6 and June 24, 2019. The complaint alleges that NMED discriminated on the basis of national origin (Hispanic and Mexican descent) in violation of Title VI of the Civil Rights Act of 1964 and EPA's nondiscrimination regulation found at 40 C.F.R. Part 7. Specifically, the complaint alleges that NMED engaged in a pattern or practice of: (1) Failing to proactively involve LEP (persons with Limited English Proficiency) and minority communities to create a culture of nondiscrimination at NMED; (2) failing to provide access to the same vital information for LEP individuals that is readily available to English speakers; (3) failing to consider and incorporate LEP and minority community background, history, needs, and concerns in the permitting process; (4) failing to proactively partner with LEP and minority communities and a variety of such community stakeholders to increase public participation by these community members; and (5) permitting facilities and discharges in areas of the state with high concentrations of LEP and minority community members. In addition, the complaint alleges that NMED permitted the WCS DP-1817 discharge permit, allowing groundwater to go unprotected in Eunice, NM, which has a predominantly Hispanic and minority population. As described below, ECRCO will be accepting one of these issues for investigation.

Pursuant to EPA's nondiscrimination regulation, ECRCO conducts a preliminary review of administrative complaints to determine acceptance, rejection, or referral to the appropriate Federal agency. *See* 40 C.F.R. § 7.120(d)(1). To be accepted for investigation, a complaint must meet the jurisdictional requirements described in the EPA's nondiscrimination regulation. First,

the complaint must be in writing. *See* 40 C.F.R. § 7.120(b)(1). Second, it must describe an alleged discriminatory act that, if true, may violate the EPA's nondiscrimination regulation (*i.e.*, an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *Id.* Third, it must be filed within 180 days of the alleged discriminatory act. *See* 40 C.F.R. § 7.120(b)(2). Finally, the complaint must be filed against an applicant for, or recipient of, EPA financial assistance that allegedly committed the discriminatory act. *See* 40 C.F.R. § 7.15

In general, ECRCO will accept, reject or refer a complaint after considering the four jurisdictional factors described in the regulation. However, if ECRCO obtains credible information from the complainant, the potential recipient or other credible sources leading ECRCO to conclude that an investigation is unjustified for prudential reasons, ECRCO may reject the complaint (or specific allegations) for investigation. Examples of prudential reasons include, 1) the same complaint allegations have been filed against the same recipient and are currently pending and/or are already resolved through a previous complaint filed with ECRCO and (2) the allegation, including any supplemental information submitted by complainant or other credible sources, does not provide sufficient information to raise the allegation above the level of speculation.¹

On June 20, 2019, ECRCO spoke with the Complainant representative in response to ECRCO's request for clarification. On June 24, 2019, the Complainant sent supplemental information to ECRCO. After a careful review of the complaint and supplemental materials, ECRCO has determined that it will not investigate the concerns raised in the complaint that are being addressed through the monitoring of the Informal Resolution Agreement reached between NMED and EPA in EPA Complaint# 09R-02-R6 on January 19, 2017. Specifically, ECRCO will not investigate the allegations that NMED has engaged in a pattern or practice of: (1) failing to proactively involve LEP and minority communities to create a culture of nondiscrimination at NMED; (2) failing to provide access to the same vital information for LEP individuals that is readily available to English speakers; (3) failing to consider and incorporate LEP and minority community background, history, needs, and concerns in the permitting process; and (4) failing to proactively partner with LEP and minority communities and a variety of such community stakeholders to increase public participation by these community members.

Although ECRCO will not investigate the above-mentioned issues as part of this complaint investigation, ECRCO will continue to work with NMED to ensure full implementation of the commitments contained in the IRA signed in relation to Complaint # 09R-02-R6. ECRCO will keep the complainants notified, as appropriate.

Additionally, the complaint alleges that NMED discriminated on the basis of national origin, by engaging in a pattern or practice of permitting facilities and discharges in areas of the state with high concentrations of LEP and minority community members. Specifically, the complaint alleges that NMED's environmental permitting policies in southeastern and southcentral New Mexico have resulted in "multiple environmental stressors, poor health and high death rates" affecting a population of persons of predominantly Hispanic and Mexican descent in that area.

¹ *See, generally*, ECRCO's *Case Resolution Manual: Executive Summary* § 2.6 (January 2017), https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf

This allegation is stated without providing supporting evidence of a nexus between NMED's policies and the health and mortality concerns described in the complaint. As a result, ECRCO will reject this allegation for investigation because the available information, including supplemental information submitted by the complainant, is not sufficient to raise the allegation above the level of speculation and provides only conclusions of alleged violations of a law enforced by ECRCO.

Finally, the complaint alleges that NMED discriminated on the basis of national origin by permitting the WCS DP-1817 discharge permit, allowing groundwater to go unprotected in Eunice, NM, which has a population that is predominantly of Hispanic and Mexican descent. ECRCO will investigate this issue.

Accordingly, ECRCO will investigate:

Whether NMED discriminated against the community in Eunice, New Mexico, that is predominantly of Hispanic and Mexican descent on the basis of national origin by issuing Groundwater Discharge Permit DP-1817 to Waste Control Specialists, LLC ("WCS") on December 5, 2018 that allegedly allows groundwater to go unprotected, in violation of Title VI of the Civil Rights Act and EPA's implementing regulation at 40 C.F.R. Part 7.

The initiation of an investigation of the issue above is not a decision on the merits. ECRCO is a neutral fact finder and will begin its process to gather the relevant information, discuss the matter further with NMED and the complainant, if appropriate, and determine next steps utilizing ECRCO's internal procedures. In the intervening time, ECRCO will provide NMED with an opportunity to make a written submission responding to, rebutting, or denying the issues that have been accepted for investigation within thirty (30) calendar days of receiving its copy of the letter notifying it of the acceptance of Administrative Complaint 02NO-19-R6. *See* 40 C.F.R. § 7.120(d)(1)(ii-iii).

EPA's nondiscrimination regulation provides that ECRCO will attempt to resolve complaints informally whenever possible. *See* 40 C.F.R. § 7.120(d)(2). Accordingly, ECRCO is willing to discuss, at any point during the process, offers to informally resolve the subject complaint. ECRCO may contact NMED to discuss its interest in entering into Informal Resolution Agreement discussions. We invite you to review ECRCO's Case Resolution Manual for a more detailed explanation of ECRCO's complaint resolution process available at https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf.

No one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected by the civil rights requirements that we enforce. *See* 49 C.F.R. § 21.11(e) and 40 C.F.R. § 7.100. Any individual alleging such harassment or intimidation may file a complaint with ECRCO.

If you have questions about this letter, please feel free to contact Zahra Khan, Case Manager, at 202-564-0460 by email at khan.zahra@epa.gov, or by mail at U.S. EPA External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460.

Sincerely,



Lilian S. Dorka
Director
External Civil Rights Compliance Office
Office of General Counsel

cc: Jennifer Hower
General Counsel
New Mexico Environment Department

Angelia Talbert-Duarte
Acting Associate General Counsel
Civil Rights and Finance Law Office
Office of General Counsel

David Gray
Acting Regional Administrator
Deputy Civil Rights Official
U.S. EPA Region 6

James Payne
Regional Counsel
U.S. EPA Region 6